

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE: NEWPORT CREAMERY, INC.

BK No: 01- 13196
CHAPTER 7

Andrew Richardson, Trustee of the Newport Creamery, Inc.
Plaintiff/Appellee

Vs.

A.P. No. 01-131196

Robert E. Swain,
Rocomi Enterprises, LLC
Newport Creamery, L.P.;
NewBerg, L.P.
NewHart, L.P., and
Tarpon Highlands Development Corporation,
A/k/a Tarpon Highlands Development Company, LLC.
Defendants

**DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR LEAVE TO
FILE APPEAL.**

Defendants contend that are several grounds to allow an appeal to be taken,
including but not limited to the following:

- The relief granted on September 21, 2001 was in the nature of final relief;
- The relief granted was not supported by evidence;
- The relief granted was beyond the statutory authority of the Court.

Defendants herein set forth in the form of the correct findings of fact and law which the Court did not permit to be filed last Monday,, as its memorandum of law in support of its motion for leave to file an appeal.

Procedural History:

On September 18, 2001, this matter came before this Honorable Court on the Motion of Andrew Richardson, Trustee of the Newport Creamery, Inc. requesting that this Court, pursuant to the Trustee's Emergency Motion of September 14, 2001, provide the following relief:

(i) Order the Defendants Swain, Rocomi, Newport Creamery, LP, NewBerg, LP, and NewHart, LP...to "retransfer" to the Trustee the real estate, physical facilities, equipment, cash, tangible and intangible personal property transferred to them by the Debtor, or obtained by them using assets of the Debtor.

(ii) Order the retransferred assets be administered by the Trustee in conjunction with his administration of all assets of the Debtor's estate.

(iii) Order that the above Orders directing the retransfer of real estate, physical facilities, cash and personal property to the Debtor to be without prejudice to the rights of defendants to object to any sale of the assets, or to make a claim to such portion of the proceeds of sale of assets attributable to any property transferred.

The Defendants filed an objection, memorandum of law and affidavits in opposition to the Trustee's motion.

Bank Rhode Island, a secured creditor, filed an objection to the relief sought with regard to any action that impacted their secured properties controlled by NewBerg, LP.

On September 12, 2001, upon the affidavits of the Trustee, the Court entered a temporary order restraining and enjoining defendants, Swain, individually, Newport Creamery, LP, NewBerg, LP, NewHart, LP, and Tarpon Highlands Development Corporation from selling, transferring, assigning, mortgaging, encumbering, pledging or alienating any property of any value whatsoever, tangible or intangible, including cash and funds on deposit without prior approval of the Trustee or of this Court.

No discovery was conducted by the parties prior to hearing.

A request by the Defendants on September 18, 2001 to remove the stay in order that they could conduct discovery was denied by the Court.

The Defendants, on September 18, 2001, filed a request for a jury trial.

On September 18, 2001, a hearing was conducted; and on September 21, 2001, injunctive relief was granted. That order is the subject of this appeal.

Questions Presented:

- (i) Did the Court err in granting injunctive relief on matters which it would not otherwise have had authority to grant final relief, being that the Defendants had not consented to having judgment entered on jury issues and on state claims?
- (ii) Did the Court have err by authorizing the Trustee to sell the property of the Defendants Newport Creamery, LP, NewBerg, LP, and NewHart, LP, when no judgment had been granted conveying such property to the Debtor, and when the Bankruptcy Court lacked jurisdiction to sell the assets of such defendants?

- (iii) Did the Court err by the granting of authority to the Trustee to control the property of the Defendants without using the higher standard of evidence required for the granting of mandatory injunction?
- (iv) Did the Court err in granting injunctive relief on matters which it would not otherwise have had authority to grant final relief, being that the Defendants had not consented to having judgment entered on jury issues and on state claims?
- (v) Since the Court, without an evidentiary hearing on the merits, without a jury trial, and without discovery, and without a final judgment, and , without statutory authority to sell Defendants' properties, granted relief which was in effect a condemnation process of the Defendants , were the Defendants' Constitutional Rights under the U.S. Constitution as secured by the provisions of 42 USC§ 1983 and by the State Constitution violated?
- (vi) Did the Court err in finding that there was sufficient evidence to support an evidentiary finding of a likelihood of success on the merits when Keith Lowery indicated that his findings themselves were "questionable"?
- (vii) Did the Court err by granting injunctive relief when there was an adequate remedy at law since the Trustee was asking for damages against the Defendants?
- (viii) Since no testimony was presented on irreparable harm, did the Court err in granting injunctive relief?
- (ix) Did the Bankruptcy Court err when it found a probability of success on the merits of a fraudulent conveyance claim by:

- Newberg, LP when the uncontradicted evidence demonstrated that its properties were purchased from third parties for cash; and when the purchase of said property occurred more than one year after the bankruptcy filing;
 - NewHart, LP when the uncontradicted evidence demonstrated that its properties were purchased from third parties for cash;
 - Newport Creamery, LP when the uncontradicted evidence demonstrated that its properties were purchased for more than their valuation with cash; when the uncontradicted evidence demonstrated that independent auditor opined that there was sufficient operating cash to be an on-going entity after sale; and when the purchase of said property occurred more than one year after the bankruptcy filing;
 - Tarpon Highlands Development Corporation when no evidence was presented to support such a claim;
 - Rocomi Enterprises, LLC, when no evidence was presented to support such a claim;
 - Robert E. Swain, when no evidence was presented to support such a claim;
- (x) Did the Court err in granting injunctive relief by considering evidence not in the transcripts or exhibits of the injunction hearings?
- (xi) Did the Court err in refusing to consider the unopposed averments in the Defendants' exhibits and supporting documentation?

- (xii) Was the Court's evidentiary findings improperly influenced by appeals to passion and emotion?
- (xiii) Since non core issues were involved, did the err Court in not making findings of fact and law?
- (xiv) Did the Court err in not allowing the Defendants to present proposed findings of fact and law?
- (xv) Did the so called "emergency" , need to sell third party property, justify the Court in terminating Defendants' discovery rights?

Defendants argue that the responses to those questions demonstrate err by the Court requiring a reversal by the U.S. District Court of the Bankruptcy Court's decision and order of September 21, 2001. Exhibit 1 attached to the notice of appeal.

The Court in deciding to grant injunctive relief made several mistakes of fact. The Appellants hereby outlines the correct findings of fact and law.

The Bankruptcy Court neglected to consider undisputed facts and affidavits which demonstrate a lack of evidence to support an award of either a preliminary injunction or a mandatory injunction.

Review of Witnesses and Affidavits:

In support of his request, the Trustee offered the testimony of Keith D. Lowery, CPA on September 18, 2001 and his 15 Exhibits and his Affidavit of September 14, 2001; the affidavit of Richard Fenstermaker of September 14, 2001, Deposition excerpts

from an unrelated case of Linda B. Swain taken on January 9, 2001, and the testimony of Peter Scotti and his Exhibit on rents.

Defendants' Affidavits:

In opposition to the request of the Trustee, the Defendants offered their memorandum of law, a proposed finding of fact and law, and four affidavits: an affidavit from NewHart, LP, with Exhibits, (2) from NewBerg, LP, with Exhibits, (3) affidavit from Newport Creamery, LP, an affidavit from Robert Swain regarding thirty-four of the averments in the Trustee's Complaint.

Correct Findings of Fact:

NewBerg, LP

Evidence was received by affidavit regarding Newberg, LP, from NewBerg, LP by affidavit from Robert Swain, and from certain references in Exhibit 15 presented by Keith Lowery.

At hearing, the Trustee indicated that he was not seeking the return of the property owned by the Defendant, NewBerg, LP.

Witness Peter Scotti presented no evidence related to NewBerg, LP.

Being that there were no facts presented to contradict the facts contained in the sworn averments contained in the affidavits of Newberg, LP, and certain of the following sworn averments contained in the affidavit of Robert Swain, those facts should have adopted by reference and found for the purpose of the hearing to have been true.

The sworn exhibit of NewBerg, LP provides as follows:

1. Bergsons Ice Cream & Food Shops, Inc. ("Bergsons"), as Seller, entered into an Asset Purchase Agreement with NewBerg, LP ("NewBerg"), as Purchaser, to purchase two parcels of real property located in Newburyport and

- Westborough, and a leasehold in Cohasset, as well as all equipment and other fixed assets used or useful in conducting the business of the stores.
2. NewBerg received its Certificate of Limited Partnership from the State of Connecticut on July 13, 2000. The General Partner is NewBerg Company, LLC, and the limited partners are Robert and Linda Swain. The Newport Creamery, Inc. is not a party to any of these documents (Exhibit 1).
 3. NewBerg paid for the purchase with cash and seller notes to Bergsons as consideration for the purchased assets. None of the cash or any other consideration used to fund this transaction was derived from The Newport Creamery, Inc.
 4. Funds for the purchase were derived from a loan from BankRI ("BRI") in the amount of \$1,640,000 commercial mortgage and a \$200,000 term note to NewBerg, secured by the assets purchased pursuant to a loan agreement between NewBerg and BRI. No funds or consideration of any manner were derived from The Newport Creamery, Inc.
 5. The \$1,640,000 Mortgage Note (Exhibit 2) and the \$200,000 Term Note (Exhibit 3) is between BankRI and NewBerg. Robert E. Swain is a guarantor of that Agreement.
 6. The Mortgage Security Agreement, the Leasehold Mortgage and the Security Agreement are all between NewBerg and BRI. The Newport Creamery, Inc. is not a party to those loan documents (Exhibits 4, 5, & 6).
 7. NewBerg entered into a Lease Agreements with 3rd parties in the Westborough location. The Newport Creamery, Inc. has significant rent and loan arrearages with NewBerg, LP. The restraining order of this court prevents the use of these rents to maintain the property and to pay mortgages.
 8. With the transaction between NewBerg and Bergson completed, on January 10, 2000 NewBerg, LP entered into lease with The Newport Creamery to use the restaurant and equipment at the Cohasset and Westborough stores. NewBerg, LP also loaned Newport Creamery, Inc. approximately \$500,000 to assist in remodeling and for working capital. (These exact figures are not available, as the Trustee has refused to allow access to those records).
 9. The amount of the rent payments were as specified by the BankRI loan documents which required the leases to be a minimum Fixed Charge Coverage Ratio of 1.15:1, that debt service to rent charges.
 10. Since that time, NewBerg has been damaged financially by The Newport Creamery Inc's failure to pay rent. Currently Newport Creamery, Inc. owes substantial pre-petition and post-petition rents, as well as a substantial amount on the loans granted to Newport Creamery, Inc. by NewBerg. Additionally, NewBerg is unable to either use amounts paid by 3rd party tenants due to the Trustee's action to restrain these funds.
 11. The Complaint filed by the Trustee is entirely factually inaccurate as it relates to all references to NewBerg in sections #24 through #29 of his Complaint.
 12. Further, Newport Creamery, Inc. has indicated it wishes to terminate the lease on the Cohasset and Westborough restaurants. It has abandoned the Westborough location and refuses to return the keys so that needed

maintenance may be performed. Neither restaurant is current on its post-petition rents.

13. NewBerg has been damaged by the restraining order in that it stops NewBerg from completing lease negotiations to a third party at the Cohasset location. It prevents the sale of the Westborough property to a 3rd party who entered into a Purchase Agreement for \$750,000 on September 14, 2001 at 2:07 p.m. BankRI has moved to foreclose and the restraining order prevents a resolution of the foreclosure with the Bank of Rhode Island.
14. The restraining order is causing NewBerg, LP irreparable damage."

The following facts contained in the sworn exhibit of Robert Swain relating to NewBerg, LP and averments 24, 25, 26, 27, 28, 29 contained in the Complaint of the Trustee should have adopted as fact by the Court:

24. This allegation is untrue. (Inference that Newport Creamery, Inc. sold assets to NewBerg, LP). The real estate and equipment in question was purchased (not transferred from the debtor) by the relevant partnership directly from 3rd party sellers with consideration paid directly by the partnerships from their own funds. This fact is easily verified by relevant closing documents.

25. This allegation is untrue. NewHart owns the real estate in one location and the equipment in two.

26. This allegation is untrue. None of the consideration for the purchase was provided by the debtor. Subsequently, the partnerships loaned substantial funds to the debtor to assist in the financing of its operations. At no time did the debtor fund the operation of the partnerships, it was vice versa.

27. This allegation is untrue. There were no funds transferred to any of the partnerships from the debtor. However, the partnerships did later loan substantial cash to fund the operation of the debtor.

28. This allegation is untrue. (There was no evidence presented by the Trustee that the debtor was insolvent on January 10, 2000 when NewBerg, LP purchased its real estate from a third party."

Keith Lowery, CPA testified regarding Exhibit 15 about 18 "questionable payments" in the total amount of \$478,0097.17 to NewBerg, LP, because he had not located the lease between NewBerg, LP and Newport Creamery, Inc. to back those checks issued between August 2000 and January 13, 2001.

Those averments and exhibit of Lowery should not have been accepted as true since the testimony by Lowery himself indicates that those checks are **questionable**

because he has had inadequate time to locate records and thus had inadequate information to give an opinion.

Moreover, the Bankruptcy Petition of Newport Creamery, Inc. lists rents and loans due to NewBerg, LP from Newport Creamery, Inc. and lists leases between NewBerg, LP and Newport Creamery, Inc. Those checks listed by Lowery might have been lease payments and/or loan repayments. To suggest such payments were fraudulent would be speculation.

NewHart, LP:

Evidence was received by affidavit regarding NewHart, LP from NewHart, LP, by affidavit from Robert Swain on specific averments of the Trustee's Complaint and from certain references in Exhibit 15 presented by Keith Lowery.

At hearing, the Trustee indicated that he was not seeking the return of the property owned by the Defendant, NewHart, LP.

Witness Peter Scotti presented no evidence related to NewHart, LP.

Being that there were no facts presented to contradict the facts contained in the sworn averments contained in the affidavits of NewHart, LP, and certain of the following sworn averments contained in the affidavit of Robert Swain, those facts should have adopted as fact .

1. A.C. Petersen Farms, Inc. ("ACP"), as Seller, entered into an Asset Purchase Agreement by and among NewHart, LP ("NewHart"), as Purchaser on the 27th of July, 2000. The Agreement called for NewHart to purchase a parcel of real property located in Bloomfield, Connecticut, and to lease a restaurant property in West Hartford, as well as all equipment and other fixed assets used or useful in conduction the business of the stores. (Exhibit 1).
2. NewHart, LP received its Certificate of Limited Partnership from the State of Connecticut on July 13, 2000. The General Partner is NewBerg Company, LLC and the limited partners are Robert and Linda Swain. The Newport Creamery, Inc. is not a party to any of these documents. (Exhibit 2).

3. NewHart paid \$1,000,000 cash to ACP on July 27, 2000 as consideration for the purchased assets. None of the cash used to fund this transaction came from The Newport Creamery, Inc.
4. Funds for the purchase were derived from a loan from FFCA in the amount of \$685,000 to NewHart, secured by the assets being purchased and the personal guarantee of Robert E. Swain, as well as \$400,000 loaned from Paul Petersen to NewHart, pursuant to a loan agreement between NewHart and Petersen. No funds or consideration of any manner were derived from The Newport Creamery, Inc.
5. The \$685,000 Loan Agreement and Promissory Note (Exhibit 3) is between FFCA and NewHart. The Newport Creamery, Inc. is not a party to that Agreement, nor is it in any way a party to any document evidencing that loan transaction. Robert E. Swain is a guarantor of that Agreement (Exhibit 4).
6. The \$400,000 Agreement is between Paul Petersen and NewHart. The Newport Creamery, Inc. is not a party to that Agreement, nor does it appear in any document and assets to NewHart (Exhibit 6).
7. The Bill of Sale for the Bloomfield property and equipment conveys the property and assets to NewHart. (Exhibit 6).
8. The Assignment of Licenses and Permits is to NewHart. (Exhibit 7).
9. The Newport Creamery, Inc. is not a party to any Agreement, and its corporate name does not appear at all in the documents.
10. NewHart entered into a Lease Agreement with ACP on July 27, 2000 to lease the restaurant at 240 Park Road, West Hartford for use "only for the operation of a family style restaurant and/or ice cream retail business..." Nowhere in the lease between NewHart and ACP is a Newport Creamery restaurant specified. (Exhibit 8).
11. With the transaction between NewHart and ACP completed, on July 28, 2001, NewHart entered into a lease with The Newport Creamery to lease the restaurant and equipment at the Bloomfield store, and a sublease to operate the restaurant and equipment at the West Hartford location (Exhibit 9).
12. The rent payments were as specified in the FFCA loan documents that required the leases to "cause to be maintained at the premises a "Fixed Charge Coverage Ratio" of at least 1.25:1..."
13. Since that time, NewHart has been damaged financially as The Newport Creamery, Inc. has defaulted numerous times on its required payments and currently owes \$166,392.80 pre-petition and approximately \$36,000 post-petition.
14. The Complaint filed by the Trustee is entirely factually inaccurate as it relates to all references to NewHart in Paragraphs #24 through #29 of his Complaint.
15. Further, the Debtor has indicated it wishes to terminate its lease on the Bloomfield restaurant while failing to stay current at either location.
16. NewHart has been damaged by the Restraining Order in that it stops NewHart from completing lease negotiations to a third party at Bloomfield, or preventing foreclosure as a result of failing to pay its obligations, already

severely negatively impacted by the failure of the debtor to pay post-petition rents.

17. Hinckley, Allen & Snyder issued an opinion on the transaction. (Exhibit 10)

18. The Seller's Closing Statement confirms all of the above (Exhibit 11).

Being that there was no testimony or affidavits to contradict the averments in 24, 25, 26, 27, 28, 29 contained in the complaint of the trustee with regard to the following facts related to **NewHart, LP**, the following facts contained in the sworn exhibit of Robert Swain related to **NewHart, LP**, should have been adopted as fact:

24. This allegation is untrue. (Inference that Newport Creamery, Inc. sold assets to NewBerg, LP). The real estate and equipment in question was purchased (not transferred from the debtor) by the relevant partnership directly from 3rd party sellers with consideration paid directly by the partnerships from their own funds. This fact is easily verified by relevant closing documents.

25. This allegation is untrue. NewHart owns the real estate in one location and the equipment in two.

26. This allegation is untrue. None of the consideration for the purchase was provided by the debtor. Subsequently, the partnerships loaned substantial funds to the debtor to assist in the financing of its operations. At no time did the debtor fund the operation of the partnerships, it was vice versa.

27. This allegation is untrue. There were no funds transferred to any of the partnerships from the debtor. However, the partnerships did later loan substantial cash to fund the operation of the debtor.

28. This allegation is untrue. (There was no evidence presented by the Trustee that the debtor was insolvent on January 10, 2000 when NewBerg, LP purchased its real estate from a third party.)

Keith Lowery, CPA testified for the Trustee regarding Exhibit 15 about 11

"questionable payments" in the total amount of \$489,733.13 to NewHart, LP. He said he had not yet located the lease between NewHart, LP and Newport Creamery, Inc. He said he did not have time to obtain sufficient information regarding NCI checks issued between August 27, 2000 and August 28, 2001.

Those averments and exhibit of Lowery should not have been accepted as true since Lowery himself indicates that they are questionable and that he had inadequate information to give an opinion. Those checks could have been for store lease payments and to suggest otherwise would be speculation.

Rocomi Enterprises, LLC.

Being no witnesses nor any affidavit contradicted the affidavit of Newport Creamery, LP regarding certain facts relating to Rocomi Enterprises, LLC, the following facts contained in the sworn affidavit of Newport Creamery, LP related to Rocomi Enterprises, LLC, should have been adopted as facts:

1. "Newport Creamery, LP ("NCLP") was certified by the Delaware Secretary of State for the purpose of acquiring certain assets of The Newport Creamery, Inc. on March 12, 1999,
2. **ROCOMI Enterprises, LLC**, a Florida limited liability company, was then formed to acquire 100% of the common stock of The Newport Creamery, Inc. following redemption of all of the existing shares of common stock of The Newport Creamery, Inc. ("NCI").
3. Next the shareholders of NCI consented to structuring the transaction as a redemption by NCI.
4. There was then a Board vote of NCI authorizing redemption of the outstanding stock including that stock of Peter Rector.
5. NCLP agreed to purchase certain assets of NCI with an appraised value of \$4,775,000 for a price that would net NCI the appraised value net of transaction costs.
6. On July 6, 1999 Rooney, Plotkin & Willey, LLC the company's independent auditors issued an unqualified opinion for the period ended March 28, 1999. The clean opinion was dated 2 weeks following the consummation of the transaction, and issued almost 4 months later. This was certainly enough time for them to determine the fairness of the transaction and the solvency of the company.
7. At the time of the transaction several law firms issued opinions that there were no violations of applicable statutes.

Newport Creamery FoodService, Inc. is not a party to this litigation.

Being no witnesses nor any affidavit contradicted the affidavit of Robert Swain regarding certain facts relating to Rocomi Enterprises, LLC, the following facts contained in the sworn affidavit of Robert Swain related to Rocomi Enterprises, LLC should have been adopted as fact by the Court:

35. This allegation is untrue. The Newport Creamery Foodservice, Inc. was incorporated during April, 2001 in Delaware and operated the ice cream business subsequently.

Exhibit 1 presented by Witness Keith that payments of \$750,953.79 were made between July 26, 2001 through August 29, 2001 were for/to Newport Creamery Food Services, Inc. and such facts are accepted as true.

Exhibit 2 presented by Witness Keith that payment of the following checks were made to Newport Creamery, Inc. to Newport Creamery Food Service, Inc.: one hundred dollars (\$100.)) was made on August 10, 2001 to the Newport Creamery Food Service, Inc.; that payment of sixty-one thousand two hundred forty-nine dollars and 17 cents (\$61,249.17) was made on August 10, 2001 to the Newport Creamery Food Service, Inc; that payment of thirty-seven thousand five hundred and fifty-one dollars (\$37,551.00) was made on August 15, 2001 to the Newport Creamery Food Service, Inc; on August 16, 2001 payment of \$18,995.17; on August 17, 2001, \$27,969.27; on August 23, 2001 the amount of \$28, 053.81; on August 23, 2001, the amount of \$39,443.10, on August 29, 2001, the sum of \$21,727.01; on August 29, 2001, the amount of \$17,078.98, and August 30, 2001, the amount of \$8,658.27.

Exhibit 3 of Witness Keith Lowery which indicates that check no. 0987 in the amount of \$50,000 was written on August 15, 2001 from the checking account of Newport Creamery Food Service, Inc. to Rocomi Enterprises, LLC is accepted as a fact.

Exhibit 3 of Witness Keith Lowery which indicates that check no. 1010 in the amount of \$35,000 was written on August 23, 2001 from the checking account of Newport Creamery Food Services, Inc. to Rocomi Enterprises, LLC is accepted as a fact.

Regarding Exhibit 15, and Rocomi Enterprises, Keith Lowery, CPA testified about 11 "questionable payments" in the total amount of \$371,861.87 to Newport Creamery Food Services, Inc. between August 10, 2001 and August 31,

2001. Those averments and exhibit should not have been accepted as true since the Lowery indicates that they are questionable and that he had inadequate information to give an opinion.

Those payments indicated that they were for the purchase of ice cream from an entity that is not a party for the purchase of ice cream. To suggest that such payments were for overcharges is speculation. Newport Creamery, Inc. could have purchased ice cream from another ice cream plant. To speculate that there were in fact overcharges and such overcharges allowed Newport Creamery Food Services, Inc. to make payments to its stockholder, Rocomi Enterprises, Inc. does not relate in any probative or material way to the pleadings of the Trustee and the notion that Newport Creamery, Inc. was in fact making an improper payment to Rocomi Enterprises, LLC, is speculative.

Tarpon Highlands Development Corporation.

Regarding Exhibit 15, and Rocomi Enterprises, Keith Lowery, CPA testified about two “questionable payments” in the total amount of \$43,916.35 being made by defendant Newport Creamery, LP to Tarpon Highland Development Corp between March 30, 2001 and August 27, 2001. Those averments and exhibit should not have been not accepted as true since Lowery indicates that they are questionable and that he had inadequate information to give an opinion. Furthermore, Lowery admits that those checks were not made from the Plaintiff to defendant Rocomi Enterprises, LLC. No connection is made between those exhibits and the pleadings of the Plaintiff, Trustee.

Those averments and portions of exhibit 15 should not have been accepted as true since Lowery indicates that they are questionable and that he had inadequate information to give an opinion.

No other testimony or exhibits were presented by the Plaintiff Trustee from Defendant Rocomi Enterprises LLC. Those averments and exhibit should not have been not accepted as true since Lowery indicates that they are questionable and that he had inadequate information to give an opinion. Those checks could have been for store lease payments and to suggest otherwise, would be speculation.

Newport Creamery, LP.

Since the Trustee presented no witnesses or exhibits to contradict the factual assertions contained in the affidavit of Newport Creamery, LP relating to Newport Creamery, LP and Rocomi Enterprises, LLC, the Court should have adopted as fact the following averments contained in the affidavit of Newport Creamery, LP:

2. Newport Creamery, LP ("NCLP") was certified by the Delaware Secretary of State for the purpose of acquiring certain assets of The Newport Creamery, Inc. on March 12, 1999
3. ROCOMI Enterprises, LLC, a Florida limited liability company, was then formed to acquire 100% of the common stock of The Newport Creamery, Inc, following a redemption of all of the existing shares of common stock of The Newport Creamery, Inc ("NCI").
4. Next the shareholders of NCI consented to structuring the transaction as a redemption by NCI.
5. There was then a Board vote of NCI authorizing redemption of the outstanding stock including that stock of Peter Rector
6. NCLP agreed to purchase certain assets of NCI with an appraised value of \$4,775,000 for a price that would net NCI the appraised value net of transaction costs.

7. NCLP then entered into an Agreement directly with FFCA to loan the necessary funds directly to NCLP to fund the purchase to be secured by certain assets to be acquired.
8. Robert E. Swain was a guarantor on that loan.
9. On the closing day, \$4,765,000 was transferred by wire directly to NCI's escrow account at Hinckley, Allen & Snyder.
10. FFCA also entered into an agreement with NCI directly to loan \$1,428,785 to NCI's escrow account secured by the equipment at 14 restaurants leased to NCI by 3rd parties.
11. With these, and other funds sufficient to redeem the shareholders in the escrow account, the old Board elected new directors of NCI and amended certain Bylaws.
12. The redemption of the existing shares in escrow was funded, and ROCOMI then purchased 100 shares of common stock representing 100% of the shares then issued.
13. On July 6, 1999 Rooney, Plotkin & Willey, LLC the company's independent auditors issued an unqualified opinion for the period ended March 28, 1999. The clean opinion was dated 2 weeks following the consummation of the transaction, and issued almost 4 months later. This was certainly enough time for them to determine the fairness of the transaction and the solvency of the company.
14. At the time of the transaction several law firms issued opinions that there were no violations of applicable statutes.
15. Over the next 2 1/2 years, prior to bankruptcy, NCLP advanced to NCI in either direct loans or rent arrearages \$886,970.
16. The Trustee's assertion in his Complaint, Paragraph #19, that there was inadequate working capital at the time of purchase is factually incorrect, as rebutted by the independent auditors opinion, as well as the fact that 12 months (and longer) following the acquisition, all creditors were being paid on a timely basis.
17. The Trustee's assertion in his Complaint, Paragraph #20 is factually incorrect. The assets in question were sold to NCLP by NCI by the previous Board of Directors.
18. The Trustee's assertion in his Complaint, Paragraph #21 is factually incorrect. The assets were purchased for cash by NCLP from NCI for exactly the appraised value set on them by Beretta Appraisal Company, which firm had been retained by the previous management for that purpose.
19. The Trustee's assertion in his Complaint, Paragraph #22 is factually incorrect. There was a clean audit opinion of March 28, 1999 by the independent auditors, which indicated there was sufficient funds to operate for 12 months. In fact 12 months later the company did pay its obligations in a timely manner.

Peter Scotti:

In Exhibit 16, Peter Scotti gave his opinion that certain properties of Newport Creamery, LP leased to the Debtor had rents which were above market rates.

Keith Lowery:

On Exhibit 15, Keith Lowery indicated for the twenty months between December 1999 and August 2001, he found twenty (20) checks made by Newport Creamery, LP to Newport Creamery, LP in the amount of one million five hundred and seventy and fifteen dollars and 90 cents (\$1,570,015.90).

Robert E. Swain:

The evidence presented against Robert E. Swain was presented by witness Keith Lowery, who summarized his evidence in exhibit #15 which described as “questionable checks” for which he had neither time nor adequate supporting records available to him to examine between September 11, 2001 and September 18, 2001.

Robert E. Swain opposed the relief sought by way of a sworn affidavit which stated that “Without limitation, the following averments in the Complaint in the Adversary Proceeding brought by Andrew S. Richardson, Trustee of the Newport Creamery, Inc. are factually incorrect as follows:

4. This allegation is untrue. I do not maintain a residence in the State of Rhode Island.

10. This allegation is untrue. There are seven restaurant locations owned by Newport Creamery, LP, not six.

14. This allegation is untrue. I do not hold all of those positions.

15. This allegation is untrue. (Swain is involved in 40 Florida businesses).

17. This allegation is untrue. In March of 1999 defendant Swain acting through defendant Rocomi purchased the Newport Creamery, Inc. Rocomi purchased shares in The Newport Creamery, Inc.

18. This allegation is untrue. Equity of NCI dropped after closing to -\$22,515. Equity in the combined entities went to \$167,028. The equity in the debtor became over \$2,082,878.

19. This allegation is untrue. There was no provision for adequate capital.

20. This allegation is untrue. The Newport Creamery, Inc. sold the real estate and equipment to Newport Creamery, LP for \$4,765,000 cash net of transaction costs.

21. This allegation is untrue. NCI sale of real estate was without equivalent value. The Newport Creamery received virtually exactly the value placed upon the assets by a third party appraiser selected by the former management of the company. Four of these appraisals were confirmed during January, 2001 by another independent appraisal firm.

22. This allegation is untrue. NCI was insolvent as a result of sale of real estate. The company received an unqualified opinion from its independent accountant, Rooney, Plotkin & Wiley as of March 31, 1999, 2 weeks after the transaction closed. The report was issued on July 6, 1999, so the auditors had almost an additional 4 months to further review the solvency of the company before issuing their final clean opinion.

24. This allegation is untrue. (Inference that Newport Creamery, Inc. sold assets to NewBerg, LP). The real estate and equipment in question was purchased (not transferred from the debtor) by the relevant partnership directly from 3rd party sellers with consideration paid directly by the partnerships from their own funds. This fact is easily verified by relevant closing documents.

25. This allegation is untrue. NewHart owns the real estate in one location and the equipment in two.

26. This allegation is untrue. None of the consideration for the purchase was provided by the debtor. Subsequently, the partnerships loaned substantial funds to the debtor to assist in the financing of its operations. At no time did the debtor fund the operation of the partnerships, it was vice versa.

27. This allegation is untrue. There were no funds transferred to any of the partnerships from the debtor. However, the partnerships did later loan substantial cash to fund the operation of the debtor.

28. This allegation is untrue

29. This allegation is untrue. The debtor had \$17,386,982 less depreciation of \$10,606,691 leaving net assets of \$6,780,291 of land, property, plant and equipment following the original acquisition. Following all acquisitions, the debtor increased its "hard" assets to a net of \$8,268,003.

30. This allegation is untrue. The funds were substantially derived from financing certain other assets owned by the debtor.

31. This allegation is untrue. No funds were transferred from the debtor to defendant Swain or his wife other than ordinary compensation for employment with the exception of two short term loans totaling \$70,000 during April and May 2001 which were repaid during June, 2001. At that time, an additional \$80,000 was loaned from Linda D. Swain to the Company.

32. This allegation is untrue. All accounting transactions between the parties were properly booked according to the Accounting Standards by the Company's comptroller.

33. This allegation is untrue. There is no basis in fact for that allegation.

34. This allegation is untrue. The rent paid by the debtor is substantially less than required under lease agreements between the debtor and the partnerships. The rents were set at a multiple of 1.25x debt service by the respective lenders. The

schedules prepared by the debtor indicate substantial rent and loan repayment is owed to the partnerships both pre-petition and post-petition.

35. This allegation is untrue. The Newport Creamery Foodservice, Inc. was incorporated during April, 2001 in Delaware and operated the ice cream business subsequently.

36. This allegation is untrue. No money other than 2 paychecks totaling approximately \$5,600 was taken out of the company by Swain during this period. The funds transferred to Foodservice were used to purchase ice cream at transfer costs that produced a loss for Foodservice. The funds were used by Foodservice to purchase ingredients and produce ice cream. When the Trustee evicted employees of Foodservice from the building there was \$156,000 at cost of ice cream in the freezer waiting to be shipped. The value of the ice cream shipped was at transfer costs better than available from 3rd parties and below breakeven for Foodservice.

37. This allegation is untrue. The only cash taken out of the debtor, other than salary by Swain was \$70,000 in short term loans repaid during June 2001. At the same time Linda Swain loaned another \$80,000 to the debtor. Additionally, the default in rent payments and loan repayments totaling in the aggregate over \$1,600,000 from the debtor to the partnerships has produced a hardship on the partnerships while the debtor took advantage of using the property to operate its business.

38. This allegation is untrue.

40. This allegation is untrue. The debtor owed funds to LP as rent payments under long existing leases both pre and post petition. The debtor owed funds to LP pre-petition as demand loans in excess of \$400,000 were granted to the debtor with virtually no repayment. LP is a separate legal entity from the debtor and uses its funds as it deems appropriate, much of which has been loaned back to the debtor. Foodservices is also a separate legal entity loaned back to the debtor. Foodservices is also a separate legal entity incorporated in Delaware during April, 2001 with its own employees. The debtor purchases ice cream from that entity and has no legal interest in its funds.

41. This allegation is untrue. The payment of rent to LP is required post petition to all landlords, not just the partnerships. The payment to Foodservice at transfer prices that result in a financial loss to Foodservice results in the loss in Foodservice and not in the debtor where it was prior to April, 2001. The ice cream manufacturing division of the debtor lost approximately \$754,000 during FYE April 2, 2001. With the operation split out to Foodservice, the cash drain to the debtor was avoided. Therefore, it should be easier for the debtor to operate. At no time were any "hard" assets transferred out of the debtor during this period.

42. I provided \$200,000 initially to assist in this effort and discussed additional funding but the Trustee has stated he won't deal with me.

43. This allegation is untrue. There is an offer for funding and an offer to purchase before the court that does not include the real estate.

44. This allegation is untrue. The operation of the real estate has nothing to do with the operation of a Newport Creamery restaurant under the existing lease terms.

45. This allegation is untrue. The facts of the transactions do not make them fraudulent transfers under the statute.

46. This allegation is untrue. There is an offer to purchase before the court that does not contain real estate. The assets were not fraudulently transferred as alleged.

47. This allegation is untrue. The facts support the transactions described by the Trustee had the impact of increased cash to the debtor in the excess of amount of \$1,500,000.

48. This allegation is untrue. I am not currently in control of any funds of the debtor. Instead, I am being damaged by the debtor who refuses to pay required post-petition rent and who has seized \$156,000 of the ice cream inventory belonging to Foodservice, and who has trespassed by locking me and my employees out of space owned by LP and not leased to the debtor. As a result, I am unable to even access my own records of the various transactions necessary to mount a detailed, factual defense."

Swain's sworn statements disputes the inferences Keith Lowery sought to suggest by Lowey's listing of "questionable checks" in exhibit 15. Lowey had the burden of proof, not Swain.

FINDINGS OF LAW:

a. The Court confused the Standards for Review for Issuance of Preliminary Injunction and a Mandatory Injunction.

(i) Mandatory Injunction:

The Court's order assumes that the Trustee would have authority to sell the defendants' assets, and, then, after sale to allow the defendants to file claims for any proceeds, if any, from the sale. During the interim before sale, the Court allowed Trustee authority to administer the defendants' use of the property and their use of cash.

The Trustee was in fact granted a mandatory injunction from this Court to Order the Defendants Swain, Rocomi, Newport Creamery, LP, NewBerg, LP and NewHart, LP... to "retransfer" to the Trustee the real estate, physical facilities, equipment, cash, tangible and intangible personal property transferred to them by the debtor or obtained

by them using assets of the debtor and he further seeks to manage and then sell such property.

Such relief sought is in the form of affirmative and final relief.

The order of September 21, 2001 put the proverbial cart before the horse.

There was no final judgment transferring the property of the Defendants to Debtor's Trustee.

The Trustee sought and was given complete control of the property rights of the defendants. Unless he, in his sole discretion to otherwise permits, he was given power to stop the defendants from paying any debt, including their mortgage payments, to stop the defendants from alienating renting, or leasing their properties, and he then seeks to sell the properties of the defendants, without regard as to whether the sale prices of the defendants' properties would exceed the liens on their properties.

His alleged legal basis for such claims were the provisions of 11 USC §548, which has one year statute of limitations, and the provisions of the R.I. Uniform Fraudulent Conveyances Act, R.I.G.L. §16-6-1 through R.I.G.L. §16-6-13. The Trustee alleges that any value in any property of the defendants were derived fraudulently from income or property of the Newport Creamery, Inc.

The Trustee must address the confiscatory aspect and legal impact of his request to sell and control the property rights of the Defendant under the Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution and under similar provisions in the R.I. State Constitutions.

To demonstrate a legal basis for such mandatory relief, the Trustee should have (i) demonstrated from an evidentiary point of view a clear right to control and sell

property of the defendants and (ii) he should have set forth law which supported the taking of such property without substantive due process and procedural due process violations of the Constitutions of the United States and of the State of Rhode Island through the pre-judgment use of equitable remedies.

To have demonstrated a legal basis for such mandatory relief, the trustee should have (i) demonstrated from an evidentiary point of view a clear right to control and sell property of the defendants and (ii) he should have set forth law which supports the taking of such property without substantive due process and procedural due process violations of the Constitutions of the United States and of the State of Rhode Island through the pre-judgment use of equitable remedies.

To obtain a mandatory injunction, ¹ "the applicants' right to relief must be indisputably clear" ¹ *Communist Party of Ind. v. Whitcomb*, 93 S.Ct. 16 U.S.Ind. 1972 and used sparingly² Both the facts and the law did support the movant's request.

It is a higher standard of evidence required for a mandatory injunction than the standard of evidence for a preliminary injunction.³

¹ ¹ *Communist Party of Ind. v. Whitcomb*, 93 S.Ct. 16 U.S.Ind. 1972.

"While a Circuit Justice of this Court apparently has authority under Supreme Court Rule 51 to grant such relief in the form of a **mandatory injunction**, usage and practice suggest that this extraordinary remedy be employed only in the most unusual case. In order that it be available, the applicants' right to relief must be indisputably clear. Applicants do not present such a case, and their application is therefore denied."

² *Dormann v. Boozer*, 414 F.2d 1168, 1173, (DC.Cir. 1969). While even a motion for a preliminary prohibitive injunction should not be routinely granted, "[t]he power to issue a preliminary injunction, especially a mandatory one, should be 'sparingly exercised.' "

³ *Columbia Hosp. for Women Foundation, Inc. v. Bank of Tokyo-Mitsubishi Ltd.*

15 F.Supp.2d 1., D.D.C.,1997. "The party that moves for a mandatory preliminary injunction must do more than merely raise a serious question about the law under which its predicates the right of recovery. In such cases, "where a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction." *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir.1994). Thus, "where an injunction is mandatory--that is, where its terms would alter, rather than preserve, the

The movant had to show more than a probability of success. He had to show a substantial likelihood of success.⁴

He failed to meet that burden and the Court err in failing to require that such standard be met.

(ii) Preliminary Injunction Standards:

The Trustee also sought relief in the form of a preliminary injunction against all defendants for relief to maintain the status quo under R.I. 's Uniform Fraudulent Conveyance Act, inter alia, R.I.G.L. 6- 16-4,⁵ and under the provisions of 11 USC §548 (a)⁶, (See averment 45 in Trustee's complaint,) through the provisions of 28 USC 1334.)

status quo by commanding some positive act--the moving party must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from the denial of the injunction." *Phillip v. Fairfield Univ.*, 118 F.3d 131, 133 (2d Cir.1997). As a rule, "[w]hen a mandatory preliminary injunction is requested, the district court should deny such relief 'unless the facts and law clearly favor the moving party.' " internal cites deleted

⁴ *Johnson v. Kay*, 860 F.2d 529, C.A.2 (N.Y.),1988.

" Where, however, the grant of the preliminary injunction will give the movant essentially all the relief he seeks, the injunction is often deemed mandatory rather than prohibitory, and a somewhat higher standard is applied, under which the movant must show a *substantial* likelihood of success on the merits, rather than merely a likelihood of success. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025-26 (2d Cir.1985)."

⁵ **RI ST § 6-16-4.** Transfers fraudulent as to present and future creditors.

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
- (b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
 - (1) The transfer or obligation was to an insider;
 - (2) The debtor retained possession or control of the property transferred after the transfer;
 - (3) The transfer or obligation was disclosed or concealed;
 - (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
 - (5) The transfer was of substantially all the debtor's assets;
 - (6) The debtor absconded;
 - (7) The debtor removed or concealed assets;
 - (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

The Trustee failed to meet those burdens of presenting evidentiary proof of the violations of the federal and state fraudulent conveyance statutes he asserted against the Defendants.

The purpose and standards for granting or denying a preliminary injunctions are well hewed in case law. *In re Oxford Homes, Inc.*, 180 B.R. 1, Bkrtcy.D.Me., 1995.

"Preliminary Injunction Standard."

The First Circuit has instructed that:

In deciding whether to grant a preliminary injunction, a district court must weigh the following four factors:

- (1) The likelihood of the movant's success on the merits;
- (2) The potential of irreparable harm to the movant;
- (3) The balancing of the relevant equities, *i.e.*, "the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld," *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir.1991); and
- (4) The effect on the public interest of a grant or denial of the injunction. *See, e.g., Id.* However, the "*Sine qua non* of [the preliminary injunction standard] is whether the plaintiffs are likely to succeed on the merits." *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir.1993). *See also United*

-
- (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
 - (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
 - (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

⁶ **11 USCA § 548 . Fraudulent transfers and obligations:**

The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within **one year before the date of the filing of the petition**, if the debtor voluntarily or involuntarily--

- (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
- (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
- (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
- (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
- (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

Steelworkers of America v. Textron, Inc., 836 F.2d 6, 7 (1st Cir.1987) ("The heart of the matter is whether 'the harm caused the plaintiff without the injunction, *in light of* the plaintiff's likelihood of eventual successful on the merits, outweighs the harm the injunction will cause defendants.' ") (quoting Vargas-Figueroa v. Saldana, 826 F.2d 160, 162 (1st Cir.1987) (emphasis in original)).

Gately v. Commonwealth of Massachusetts, 2 F.3d 1221, 1224-25 (1st Cir.1993), *cert. denied*, 511 U.S. 1082, 114 S.Ct. 1832, 128 L.Ed.2d 461 (1994).

(1)Injunctions are equitable remedies with significant consequences. They should be " 'used sparingly and only in a clear and plain case.' " Georgia-Pacific Corp. v. Great Northern Nekoosa Corp., 727 F.Supp. 31, 32 (D.Me.1989) (quoting Stanton by Stanton v. Brunswick School Department, 577 F.Supp. 1560, 1567 (D.Me.1984)).

¹¹¹ "Irreparable injury is the sine qua non for the grant of a preliminary injunction." United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir.1978)

¹ Be that as it may, irreparable harm is not assumed; it must be demonstrated. And even where real property is involved, "Speculative injury does not constitute a showing of irreparable harm." Public Service, 835, F.2d at 383.' "

Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, at 7, C.A.1 (R.I.), 1991.

In re Oxford Homes, Inc.180 B.R. 1, Bkrtcy.D.Me.,1995.

The Trustee failed to meet those burdens of proof, on behalf of Newport Creamery, Inc.

He had shown no basis for equitable relief on his second claim for damages claims against Robert Swain in his capacity as President of Newport Creamery which alleged violation of his state fiduciary duties to Newport Creamery, Inc.

He had no standing to bring such a claim.

He had an adequate remedy at law, to wit damages.

He demonstrated no irreparable harm.

The Trustee should have also demonstrated his standing (i) to bring such claim under the provisions of 28 USC §1334 and 28 USC 157, (ii) his basis for seeking

injunctive relief; and, his standing to bring a claim on the basis of a damage to the Debtor corporation unsecured creditors when the proceeds of such claim may inure to the benefit of administrative expenses and secured creditors. He did not.

B. Analysis of Claims Against Each Defendant:

Robert E. Swain:

The Trustee sought mandatory relief against Robert E. Swain in his individual capacity. He sought to control all his expenditures and use of property in his own name. The Trustee further sought to enjoin Robert E. Swain in his personal capacity from transferring any of his assets, including home leases, cars, and investments regardless of market demands.

Swain had filed affidavits opposing such relief. In support his motion, the Trustee has presented Keith Lowery, who has suggested through exhibits 4,5,6,7, 9, and 15 that Robert E. Swain has received some questionable payments from Newport Creamery, Inc.

For the reasons set forth below the Trustee did not meet his evidentiary burdens and did not demonstrated legal standing to bring his state fiduciary claims against Swain

Irreparable Harm:

No testimony or exhibits were presented by the Trustee that the Debtor was irreparable harmed⁷ by any action of Robert E. Swain.

⁷ “Irreparable injury is the sine qua non for the grant of a preliminary injunction.” *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir.1978)

⁷ Be that as it may, irreparable harm is not assumed; it must be demonstrated. And even where real property is involved, “Speculative injury does not constitute a showing of irreparable harm.” *Public Service*, 835, F.2d at 383.’

..

The trustee made an unsworn averment at #46 in his pleading that "It is impossible for the Trustee to properly market or obtain a fair value in a sale of the debtor's asset without combining all of the assets regularly used in the business of the debtor including the assets fraudulently transferred to the defendants Tarpon, Rocomi, (sic) LP, Newberg, and NewHart.

No evidence was supported to support those averments. Evidence of irreparable harm must be demonstrated.

No proposed purchase and sale agreements were presented. No opinions of business experts were presented to support the theory of the trustee.

The Trustee made an unsworn averment at Paragraph 47 that "the above described actions of defendant Swain and the other defendants have damaged the debtor in the amount of nine million dollars."

If the Trustee is correct in such averment, he thus had an adequate remedy at law, to wit, monetary damages for his tort action⁸, and he has suffered no irreparable harm⁹.

Probability of Success on the Merits.

There was inadequate evidence of any fraudulent conveyances by the debtor to Robert E. Swain under state or federal laws. The trustee had only presented evidence

Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, at 7, C.A.1 (R.I.), 1991.

⁸ **Martin v. Lincoln Bar**, 622 A.2d 464, (R.I. 1993). If a prejudgment attachment is an available remedy in tort actions, then similarly styled restraining orders are not available to the Trustee to restrain Swain.

⁹ "For purposes of a preliminary injunction, an injury is 'irreparable' if it cannot be undone through monetary remedies." *United States v. State of Texas*, 628 F.Supp. 304, 313 (E.D.Tex.1985).

questioning payments to Swain by NCI which at later examination may have been compensation payments from NCI.¹⁰

Most of those alleged questionable payments were made more than year before the filing of the Chapter 11 provision to be cognizable under the provisions of 11 USC § 548.

The greater portion of the questioned payments were not made to Swain by the Debtor but by Newport Creamery, LP, and Newport Creamery Food Services, Inc. which by definition can not be subject to fraudulent transfers complaints by the Debtor.

The standing of the Trustee to bring on behalf of his debtor corporation a state tort claim of a violation of fiduciary duty against Swain in his capacity as President of Newport Creamery, Inc is doubtful under the provisions of Title 11 and under the provisions of 28 USC § 1334(b)¹¹.

The evidence against Swain as an individual is neither clear and convincing nor more likely than not to be evidence of fraudulent conveyances.

The trustee had rested his case upon several "questionable" checks summarize in exhibit 15. Those checks are not conclusive evidence of any fraudulent conveyances. They might have loans to Swain. With an incomplete accounting, no fact finder can only

¹⁰ Exhibit 15 set out checks in the amount of \$152,750 to Robert Swain in the period between April of 1999 and June of 2001. It has more reasonable to infer that those checks were compensation than they were fraudulent conveyances.

¹¹ In re: *Almacs, Inc. D.R.I.* 1996, 202 B.R. 648

Delaware fiduciary duty breach cause of action brought by trustee of creditor litigation trust against participants in Chapter 11 debtor's leveraged buyout (LBO) did not give rise to bankruptcy jurisdiction, though confirmed plan retained bankruptcy jurisdiction for avoidance causes of action; breach of fiduciary duty claims are fundamentally different from avoidance actions, and purchaser of debtor's assets, who was stranger to estate, would receive any recovery. 28 U.S.C.A. §1334(b).

speculate as to whether or not the checks were loans which were repaid.¹² The checks might have had compensation. The state of the evidence does not answer those questions.

According to exhibit 15, Robert and Linda Swain received one “questionable check” of ten thousand dollars \$10,000 wired from Newport Creamery, Inc. on April 30, 1999, more than one year beyond the statute of limitations contained in 11 USC §548, and an additional \$221,000 of questionable checks from defendant Newport Creamery, LP between November 2, 1999 and August 27, 2000.

Without more, those checks do not prove that a violation of 11 USC §548 or of the State Uniform Fraudulent Conveyances Act is either indisputably clear to satisfy a mandatory injunction request or more likely than not to be true to satisfy a request for a preliminary injunction.

The Trustees claim regarding the “questionable” ten thousand dollar check of April 30, 1999 is beyond the statute of limitations under 11 USC §548.

The Trustee presented no evidence that there was no value received for such checks or that the Debtor was insolvent at the time of the issuance of the checks in question.

The trustee has present no legal basis for questioning any checks of the Defendant corporation, Newport Creamery, LP under the provisions of 11 USC 548 or under the R.I. Uniform Fraudulent Conveyances Act, let alone any checks paid by the

¹² There were no transfers to avoid as either fraudulent or preferential transfer when debtor repaid loans to its principals, but each principal redeposited loan proceeds back into debtor's bank account, nullifying the transfers. *In Re: Top Sport Distributions, Inc*; Bkrcty, S.D. Fla, 1984, 41 B.R. 235.

Defendant Newport Creamery, LP to Robert E. Swain. Newport Creamery, LP was not and is not an asset of the Debtor.

Moreover, the Trustee of Newport Creamery, Inc. has presented no legal basis for asserting a right to collect proceeds from a fiduciary rights violation of an officer of the debtor on behalf of third party unsecured creditors, some of whom are named defendants in the bankruptcy petition and are adversaries here.

Such damage claims are normally resolved by judgments and the payment of cash after judgment, and injunctive relief follows judgment and does not precede judgment.

Assuming the Trustee had standing to bring such fiduciary claims, he has an adequate remedy at law. He can collect a damage claim.

There is also lack of adequate evidence to support the Trustee's claim against Swain under 11 USC§ 548 and many of the claims are beyond the statutes of limitation.

There is also lack of adequate evidence to support the Trustee's claim against Swain under provisions of the Rhode Island Uniform Fraudulent Conveyance Act.

Other than disputed cash payments outlined in Exhibit 15, there is no evidence alleged or presented of any real estate or personal property of the debtor being transferred to Robert Swain.

There is doubtful standing for the Trustee to bring his state fiduciary duty violation against Swain, there is inadequate evidence to such complaints; and such damage claims are not appropriate for injunctive relief in either a mandatory or preliminary injunctive form.

The trustee failed to demonstrate an “indisputably clear” right to a mandatory injunction against Swain and to otherwise prove a substantial likelihood of success” on his request to control Swain’s individual property interests and his cash.

The trustee has failed moreover to demonstrate that he has a probability of success of obtaining a permanent injunction against Swain from using property and cash allegedly derived by fraud from the Newport Creamery, Inc.

Balancing the Equities:

The trustee seeks to restrain Swain from spending any money or transferring any of his assets through speculative evidence. He does not claim to seek in his pleadings any return of property or cash from Swain. In the form of a preliminary judgment, he is seeking in effect a prejudgment attachment on his nine million dollar fiduciary violation charge without any evidence demonstrating a clear likelihood of success. The law disfavors pre-judgment attachments in tort cases. The trustee has no equitable basis for seeking a restraining order against Swain in his individual capacity. To limit Swain from responding to market changes and not allow him to protect himself from losses will only damage Swain and be of no benefit to the Trustee’s damage’s claim. If the Trustee is correct about his tort case, then Swain would have less money to satisfy a judgment. The trustee seeks essentially the power to drive Swain into personal bankruptcy by the equities favor Swain.

Public Interest:

The public has no apparent interest in the claims of the Trustee. There is no public benefits for the success of either party in this litigation.

The trustee's motions for a preliminary injunction against Robert E. Swain should have been denied.

NEWPORT CREAMERY, LP.

In exhibit 15, Keith Lowery indicated that he questioned checks paid to Newport Creamery, LP in the amount of \$1,570,015.90.

Irreparable Harm:

The trustee has not even shown a "gosmer" of evidence of "irreparable harm" in support of his claim against Newport Creamery, L.P.

There is no evidence that the properties of Newport Creamery, LP have any equity which would be of value to the debtor. There is no evidence that any purchaser desires the properties of Newport Creamery, LP, which are subject to mortgage liens in excess of \$4,900,000. There is no evidence that Newport Creamery, LP would refuse to lease such properties to a new buyer. There is no evidence that bare the allegation that the properties of Newport Creamery, LP are needed to market the assets of the debtor is a fact.

There is failure of evidence.

Probability of Success on the merits.

According to the un rebutted affidavit of Newport Creamery, LP, The real estate owned by Newport Creamery, LP was purchased from Newport Creamery, Inc on March 12, 1999 for \$4,650,000 when Robert Rector was President. The property was then leased to the debtor consistent with the terms required by the secured lender to Newport Creamery,LP which required rent to be a factor of 1.2 of debt service. A few month later, an independent auditing firm certified that Newport Creamery, Inc. met the

going concern standards under general accounting standards, to wit, there was sufficient funds to pay creditors for twelve months. Whether or not lease payments were in the year 2001 higher than market does not support a finding that a real estate transaction in March of 1999 a fraudulent transaction under state or federal bankruptcy law.

The date of transfer of the real estate was more than a year from the filing of the Chapter 11. Thus, the provisions of 11 USC §548 are not applicable since that provision has a one year statute of limitations.

Adequate consideration and solvency are defenses to the provisions of R.I.G.L. §16-6-6. The trustee in his unsworn pleading either misread or misunderstood the report of the accountants on the issue of solvency. He apparently confused group wide accounting with the individual accounting of the debtor.

Neither the evidence nor the law support a finding of substantial likelihood of success for a mandatory injunction or finding of a probability of success on the merits.

Balancing of Interests:

The debtor has an unsubstantiated interest in owning the property of Newport Creamery, LP. The defendant owns the property and needs to pay its mortgages, and to otherwise manage its properties and collect monies due to it. The sale of the properties could not only cause a loss of Defendant's equities and future profit, but the management of the property by the defendant may damage the property interests of the Defendant. The balance of equities favor the Defendant.

Public Interest:

There is no public interest in this matter.

ROCOMI ENTERPRISES, LP:

There was a little of any evidence adduced by either party about Rocomi Enterprises, LP.

Rocomi Enterprises, LP paid approximately \$275,000 in cash for one hundred percent of the stock of Newport Creamery, Inc in 1999. Apparently, as a stockholder of Newport Creamery Food Services, Inc. a check in the approximate amount of \$85,000 was issued to Rocomi by the Newport Creamery Food Services, Inc. There is no identification of any assets transferred to Rocomi by the debtor.

There is no evidence of irreparable harm, of either probability of success on the merits, or of a substantial likelihood of success on the merits.

Since there is no apparent evidence of any transfers from the Debtor to Rocomi, there can be harm to the debtor to balance against the massive harm to the Defendant from a preliminary injunction. There is no public interest factor involved in this matter.

The motion of the Trustees to enjoin Rocomi Enterprises, LLC should have been denied.

Tarpon Highlands Development Corporation:

The Trustee presented no evidence related to transfer from Newport Creamery, Inc to Tarpon Highland Development, Inc. Exhibit 15 indicates two checks from Newport Creamery, LP to Tarpon Highlands Development Corporation in the amount of \$43,816.

There is no evidence of irreparable harm, of either probability of success on the merits, or of a substantial likelihood of success on the merits.

Since there is no apparent evidence of any transfers from the Debtor to Tarpon Highlands Development Corporation, there can be harm to the debtor to balance

against the massive harm to the Defendant from a preliminary injunction. There is no public interest factor involved in this matter.

The motion of the Trustee to enjoin Tarpon Highlands Development Corporation should have been denied.

NewBerg, LP.

The Trustee withdrew his request for mandatory injunction against NewBerg, LP.

The Trustee presented no evidence of irreparable harm by any act of NewBerg, LP. He presented no evidence of the probability of the success on the merits of his request for a preliminary injunction against NewBerg, LP.

Questionable checks which may have been for lease payments do not arise to be more probable than not fraudulent conveyances.

The affidavit of NewBerg, LP indicates that its property were derived from third parties, that it has unpaid rents due from the debtor, and it otherwise denied with detailed facts of the averments related to NewBerg, LP.

To restrain NewBerg, LP from the use of its property and its ability to conduct business causes greater harm to NewBerg, LP than to Newport Creamery, Inc. which has no apparent factual basis for its legal claims and which apparently has no need to lease the locations of NewBerg, LP for use as stores.

There is no evidence of a public interest in enjoining NewBerg, LP.

The Trustee's motion for a preliminary injunction against NewBerg, LP should have been denied.

NewHart, LP.

The Trustee withdrew his request for mandatory injunction against NewHart, LP.

The Trustee presented no evidence of irreparable harm by any act of NewHart, LP. He presented no evidence of the probability of the success on the merits of his request for a preliminary injunction against NewBerg, LP.

Questionable checks which may have been paid as lease payments do not arise to be more probable than not fraudulent conveyances.

The affidavit of NewHart, LP indicates that its property were derived from third parties, that it has unpaid rents due from the debtor, and it otherwise denied with detailed facts of the averments related to NewBerg, LP.

To restrain NewHart, LP from the use of its property and its ability to conduct business causes greater harm to NewHart, LP than to Newport Creamery, Inc. which has no apparent factual basis for its legal claims and which apparently has no need to lease the locations of NewHart, LP for use as stores.

There is no evidence of a public interest in enjoining NewHart, LP.

The Trustee's motion for a preliminary injunction against NewHart, LP should have been denied.

Lack of Core Authority to Sell Assets.

The Court in granting the injunctive relief on September 21, 2001 overlooked its lack of statutory authority to sell the Defendants' property.

The relief itself was unlawful.

Without that statutory authority, the injunctive relief is meaningless.

The Trustee received a "preliminary" order allowing him to sell the assets of the defendant Newport Creamery, LP, a Rhode Island lessor of Newport Creamery stores,

of Defendant NewBerg, LP, a Massachusetts lessor of Newport Creamery stores, and of NewHart, LP, a Connecticut lessor of a Newport Creamery Store.

Defendants contend that the Bankruptcy Court does not have the “core” authority to sell the assets on a non-debtor pursuant to the provisions of 28 USCA §157(b)(2) (N).

The U.S. District Court may has authority through its original jurisdiction through the provisions of 28 USC § 1334 over the assets of the Debtor.

The U.S. Bankruptcy Court has jurisdiction though provisions of 28 USC §§151, 157, over the property owned by the Debtor¹³.

Neither the U.S. District Court nor the Bankruptcy Court, however, have original jurisdiction over the properties owned by the Debtor’s adversaries, Newport Creamery, LP, Defendant NewBerg, LP, and Defendant NewHart, L.P.

Note that the Trustee is asking for damages for the alleged fraudulent conveyances and has been granted “preliminary” authority to sell the lessors’ properties prior to a judgment on fraudulent conveyance charges on September 21, 2001. See Order of September 21, 2001.

The Defendants are now appealing that order of the Bankruptcy Court, on the basis, inter alia, that (i) it does not have the jurisdictional authority to sell the assets of the Defendants; and, on the basis that (i) the Bankruptcy Court does not have authority to sell Newport Creamery, LP’s asset before it determines the merits of the fraudulent conveyance claim.

¹³ Bankruptcy courts have primary, core, in rem subject matter jurisdiction over assets actually or constructively in possession of debtor’s bankruptcy estate. In re. Tamposi Family Inv. Properties, Bkrtcy. D.N.H.1993, 159 B.R. 631. Bankruptcy court has exclusive jurisdiction not only over debtor’s property, but also over property of estate. Matter of Celotex Corp.,Bkrtcy. M.C. Fla. 1993, 152 B.R. 667.

Such authority is not within the “core” authority of the Bankruptcy Court,¹⁴ which is otherwise subject to only appellate review standards in the United States District Court. 28 USC § 158.

A bankruptcy judge can only sell the assets of the debtor pursuant to the provisions of 28 USCA §157(b)(2) (N). Such core authority only applies to “orders approving the sale of property **other than property resulting from claims brought by the estate against persons who have not filed claims against the estate.**”

None of the defendants, to date, have brought any claims against the estate of Newport Creamery, Inc.

There has been no final judgment on the merits of fraudulent conveyance claims by the Trustee against the Defendants.

The order has put the proverbial cart before the horse.

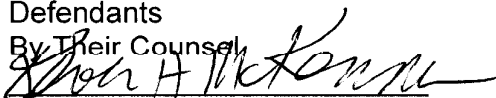
Without a final judgment, which is not possible within the Bankruptcy Court, the relief granted is inappropriate.

Thus, there is strong probability that the Defendants’ appeals will be granted.

Presented By:

Defendants

By Their Counsel,



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¹⁴28 USCA §157(b)(2) (N) orders approving the sale of property **other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;** and

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CERTIFICATION

I hereby certify that on the 1st day of October 2001, I caused a copy of this memorandum to be mailed to Andrew Richardson, Trustee, and to his counsel, Boyajian, Harrington, and Richardson, 192 Waterman Street, Providence, Rhode Island 02903 and to John Fitzgerald, counsel for the United States Trustee, 11th Floor, 10 Causeway Street, Thomas P. O'Neill Federal Building, Boston, Massachusetts.

